CONVICTION OF THOSE INVOLVED IN "SIT-IN" DEMONSTRATION REVERSED

Garner v. Louisiana
368 U.S. 157 (1961)

On March 29, 1960, Negro students at Southern University attempted sit-in demonstrations at lunch counters in a drug store, a department store, and a bus terminal in Baton Rouge, Louisiana. The students were arrested and charged with violation of the Louisiana breach of peace statute.[1] Their refusal to move from their seats, after being requested to do so, was held to be "conduct in such manner as to unreasonably and foreseeably disturb the peace."[2] The Supreme Court of Louisiana upheld the convictions, but certiorari was granted by the United States Supreme Court[3] and the judgment was reversed.[4]

The majority of the court, finding it unnecessary to decide whether such "sit-ins" were a protected right or a form of criminal activity, reversed on the ground that the record was so totally devoid of evidence that the convictions lacked due process.[5]

This finding by the Court is arguable[6] and even assuming that its basis is correct, the decision does not appear to affect anyone but the petitioners. It seems plain that a conviction, in order to comply with the requirements of due process, should be supported by at least some evidence of guilt. The fact that the Court made the same ruling the year before in *Thompson v. City of Louisville*[7] makes the majority's holding a disappointment to those who may have anticipated a significant ruling on the sit-in demonstrations.[8]

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[1] La. Rev. Stat. § 14:103(7) (1950).

[2] Garner v. Louisiana, 368 U.S. 157, 158 (1961) (Louisiana Supreme Court decision not officially reported).

[3] Garner v. Louisiana, 365 U.S. 840 (1960).

[4] Garner v. Louisiana, *supra* note 2.

[5] *Id.* at 163.

[6] The majority interpreted the Louisiana statute as requiring outwardly boisterous or unruly conduct (368 U.S. at 169) and held that the trial judge could not take judicial notice of strained relations between the races in the locality without informing the defendants (368 U.S. at 173). See concurring opinions by Mr. Justice Douglas, 368 U.S. at 176-7, and Mr. Justice Harlan, 368 U.S. at 193.

[7] 362 U.S. 199 (1960).

[8] Mr. Justice Harlan in a concurring opinion would protect the petitioners' conduct on the ground that it is an exercise of free speech. The demonstrations can be looked at as a means of bringing to the public attention the plight of the Negro in the South. Viewed in this way, the sit-ins appear very similar to picketing by labor organizations, which was held to fall within the constitutional protection in Thornhill v. Alabama, 310 U.S. 88 (1939). There is, however, one important difference. Picketing takes place on public sidewalks while the sit-ins occur on private property. Mr. Justice Harlan overcomes this distinction by finding implied permission by the management (of doubtful validity in the case of Defendant Briscoe) (368 U.S. 197-8). Recognition of the sit-ins as an exercise of free speech is not the complete answer. In the opinion

The case is exceptional, however, for the views advanced by Mr. Justice Douglas in his concurring opinion.

Mr. Justice Douglas found that segregated lunch counters in this case were forbidden by the fourteenth amendment.[9] He established the tie-in between the conduct of the store owners and the state, necessary to lift such activity from the area of private wrongdoing, in two ways: by custom and by state regulatory power. To show that segregation is basic to the Louisiana way of life, he cited an impressive list of statutes[10] requiring segregation in a variety of activities and places (although none of these required segregation in facilities involved in the *Garner* cases). There does seem little doubt that the action of the owners in the *Garner* case was approved by the community. There is a great deal of doubt, however, as to whether this alone should be enough to bring their conduct within the reach of the fourteenth amendment.

The notion that a state custom supporting racial segregation by individuals is prohibited by the fourteenth amendment was negatively implied by Mr. Justice Bradley in the *Civil Rights Cases*[11] in 1883. However, the Supreme Court in later cases dealing with discrimination does not appear to have taken advantage of this opening. If it had, the holding in that case—that Congress could adopt only such general legislation as may be necessary to counteract state action—would have been more than ample to reach most "private" discrimination in the Deep South. In those states with a tradition of segregation, it can be assumed that discriminatory actions by individuals take place with the approval of the community.[12]

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of the present majority of the Supreme Court, the right of free speech in the area of socio-economic discussion must be balanced against the interest of the state in providing for the general welfare of its inhabitants. Also, sit-ins involve more than merely the dissemination of ideas. If the Negroes' occupation of seats prevents white customers from being served, the demonstrators have gone beyond calling attention to their situation and are applying direct economic coercion by depriving the owners of revenue. The constitutional protection would not extend to such conduct. See United Electrical Workers v. Baldwin, 67 F. Supp. 235 (D. Conn. 1946), where pickets formed a solid line interfering with free access to the picketed plant.

[9] Garner v. Louisiana, *supra* note 2, at 181 (concurring opinion).

[10] Garner v. Louisiana, *supra* note 2, at 179-81 (concurring opinion). See, *e.g.*, La. Rev. Stat. § 4:5 (activities involving social contacts), § 15:752 (persons), and § 33:4558 (in public facilities).

[11] 109 U.S. 3 (1883).

[12] In the only case which Mr. Justice Douglas cites to support his contention, Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1960), the court did find that there was a "custom, practice and usage" of the city denying protection of the law, but it was not necessary for the decision. The court had no trouble finding discriminatory state action. A state statute provided that every railroad company in the state was to provide and maintain waiting rooms having regard to race and sex, to be determined by the state public service commission, and the commission promulgated an order requiring that all common carriers by rail were to provide separate waiting rooms for white and Negro at each passenger depot.

The Baton Rouge City Code, as do most municipal codes, requires a permit in order to operate a restaurant.[13] To Mr. Justice Douglas, restaurants are therefore "property affected with a public interest" and the licensee is an agent of the government. From this he concludes that the restaurateur is subject to the same constitutional restriction as is the state government itself.[14] If the licensee of the government operates under a "privilege,"[15] this notion has much persuasive force. The authority of the government is derived from the people and a policy of discrimination against a large class of those people seems at best sheer ingratitude. However, a license is not a privilege in the sense that it may be granted or withheld at the whim of the regulating body. While every business or occupation is subject to regulation by the state in the public interest,[16] if a statute or an administrative agency allows some citizens to engage in what is presumptively a legitimate business while denying such right to others, the basis for distinction must have some rational relation to the police power.[17]

As a practical matter, the use of state regulatory power as a criterion cannot stand when carried to its logical extreme. Doctors,[18] lawyers,[19] and those in most other professions[20] must receive the permission of the state to practice within its borders. Cities also have authority to require licenses for any number of things within their jurisdiction, *e.g.*, taverns,[21] billiard rooms and livery stables.[22] To hold these persons as agents of the state and these businesses as "property affected with the public interest" seems rather extreme. The issue of whether discrimination by a licensee of the state is forbidden state action has been before the federal courts in the past and has been rejected on the ground that the requirement is merely to insure minimum health standards in restaurants for the protection of the community and is not an attempt to control the management of the business or to dictate who is to be served.[23] The state in granting the license would at most be *permitting* discrimination by the licensee and would not, as Mr. Justice Douglas suggests, be *enforcing* a policy of segregation.[24]

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13 Garner v. Louisiana, *supra* note 2, at 183 (concurring opinion).

14 *Ibid.*

15 Mr. Justice Douglas appears to base his argument on this assumption. See Garner v. Louisiana, *supra* note 2, at 184-5 (concurring opinion).

16 11 Am. Jur. *Constitutional Law* § 337 (1937).

17 11 Am. Jur. *Constitutional Law* § 285 (1937); 33 Am. Jur. *Licenses* § 17 (1941).

18 Ohio Rev. Code § 4731.14 (1953).

19 Ohio Rev. Code § 4705.01 (1953).

20 Ohio Rev. Code Title 47 (1953).

21 Ohio Rev. Code § 715.63 (1953).

22 Ohio Rev. Code § 715.61 (1953).

23 Williams v. Howard Johnson Restaurant, 268 F.2d 845 (4th Cir. 1958); Slack v. Atlantic White Tower System, 181 F. Supp. 124 (D. Md. 1960); Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark. 1949).

24 The license cases cited by Mr. Justice Douglas are easily distinguished from the restaurant cases. They involve either an exclusive franchise such as a city transit service (Gayle v. Browder, 352 U.S. 903, 1956; Boman v. Birmingham Transit Co.,

Garner might have been decided differently had the case arisen under the new Louisiana statute prohibiting a person from going on any structure belonging to another after having been forbidden to do so by any authorized person.[25] The *Civil Rights Cases*[26] leave no doubt that the fourteenth amendment does not give the federal government the power to prohibit individuals from discriminating because of race.[27] If the Negro is to be protected against such private conduct, he must ordinarily look to the state. As a result of the decision in the *Civil Rights Cases,* the Court places much emphasis on the ability, or inability, to find the necessary connection between the defendant and the state. However, it appears that the search for state action takes place, not as a required step in reaching the decision, but as a rationalization after the Court has determined how it will rule.[28] The critical issue should not be categorizing the activity of the defendant as private or state action, but rather determining whether the state denies the Negro the equal protection of the laws by permitting private discrimination on the basis of race without liability.[29] In the discrimination area, when the state defines and enforces the legal relations between individuals, there are many competing interests which should be considered. In determining which interests should prevail, the state is not permitted to be influenced by the race of the parties. A local policy decision that a particular interest is not important enough to be protected is proper, but the same determination would be improper if it is a disguised attempt to deny the remedy to a particular class.[30]

280 F.2d 531, 5th Cir., 1960) or publicly owned facilities such as a municipal golf course or a public beach (Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877, 1955; Holmes v. City of Atlanta, 350 U.S. 879, 1955).

[25] La. Rev. Stat. § 14:103.1 (1960 Supp.).

[26] Civil Rights Cases, *supra* note 11.

[27] But see tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951) and Harris, The Quest for Equality (1960). There is much evidence that the fourteenth amendment, when passed, was meant to be much broader than the construction it was later given in the courts. The aim of the amendment was to remove all constitutional doubts from the civil rights bills. These bills asserted a broad power on the part of the federal government to protect specified rights not only against unjust legislation but also against prevailing public sentiment and custom.

The arguments of those who opposed the amendment were based on the ground that it would destroy the federal system and create a consolidated national government. This tends to show the courts gave much less power to the federal government than was originally granted.

[28] As a result, the language of the Court may be misleading in attempting to predict the results of future cases. In the *Garner* case, the store owner's conduct was supported by the police, who forced the demonstrators to leave, and by the court, which determined that the petitioners were guilty of criminal conduct in remaining seated at a segregated counter. This would be enough to find state action according to the opinion in Shelley v. Kraemer, 334 U.S. 1 (1948).

[29] Horowitz, "The Misleading Search for 'State Action'," 30 So. Cal. L. Rev. 208, 211 (1957).

[30] For example, a policy decision that neither whites nor Negroes deserved redress

The fact that the sit-ins occur in the Deep South rather than in some other area would influence the Supreme Court's decision. Segregated facilities are a part of the "accepted" way of life in many Southern communities. Besides the difference this would make in the impact on the interest of the Negro,[31] it is also important in its effect on the notion of federalism. The phrasing of the fourteenth amendment prohibits state, as opposed to individual, discrimination. Thus the congressmen who passed this amendment expressly recognized the value in decentralizing some administrative and policy-making functions. Placing responsibility and control in the smallest possible unit has many advantages.[32] However, the doctrine should not be applied so as to insulate local irresponsibility or to give incentive to further private discrimination. If the sit-ins arise in an area where local authorities have demonstrated an earnest attempt to resolve the problem of race relations, the federal government should more readily leave the Negroes to their local remedies.[33]

In deciding each case the court should attempt to weigh the harm caused the Negro if he would not be allowed to do what he wished against the benefit which the other party would obtain by discrimination. If both the restaurant owner and the Negro customer desired to do business, the court should not enjoin such a transaction because another customer at the same counter did not wish to eat with persons of a different race. The right to enter into a contract would far outweigh the disaffected third party's right to choose who shall not be his dinner companions in a public establishment. The same result would probably be reached if a former owner tried to prevent the new owner from serving Negroes because of a covenant to that effect in the deed.[34] A home owner may refuse to permit anyone from entering his house and his reasons for granting or denying access may be due to prejudice or mere whim. His interest in privacy and freedom of association are sufficiently important that he will not be held to any reasonable standard.[35] The segregated lunch counter falls somewhere between these extremes along with countless other possible fact situations. Denial of service at a particular lunch counter could have diverse impacts. The harm could be

on being excluded from a neighborhood because of race would in its practical effect deny the remedy only to the Negro. A white person who was prevented from purchasing a house in an all-Negro neighborhood would have little trouble finding comparable facilities elsewhere. The same is not generally true of the Negro who is refused housing in an all-white neighborhood. See Van Alstyne and Karst, "State Action," 14 Stan. L. Rev. 3, 14-16 (1961).

31 The impact on the interest of the Negro would be much more serious if segregated restaurants were the rule rather than the exception in the community.

32 For example: Federal legislation is ordinarily aimed at the whole country; it would be awkward in correcting isolated local evils; those in the community tend to have more knowledge of local controversies; it allows the local community to retain more "ballot box" control over those formulating the policy which will affect it.

33 Van Alstyne and Karst, *supra* note 29, at 17.

34 Shelley v. Kraemer, *supra* note 27.

35 Van Alstyne and Karst, *supra* note 29, at 7.

negligible or rather serious, depending on the circumstances. If there is a separate counter in the building which caters to Negroes, the interest in being able to obtain sustenance is virtually unaffected. Even if the restaurant refused to serve Negroes on any basis, the harm caused the Negro would not be great if there were other restaurants in the same vicinity that did not discriminate. If there is no other restaurant in the vicinity that would serve Negroes, the effect would be more serious. The inability to obtain a meal could be detrimental to health.

The importance of protecting the interest of the Negro in being served might depend upon the reason the person desired service at this establishment. If he were required to be in the area for a prolonged period, *e.g.*, because of his job or his school, his interest would outweigh that of a shopper who would not have to make the trip at meal time. By the same reasoning, the interest of a shopper in obtaining refreshment is far more important than that of a person who came for the sole purpose of demonstrating. Even in the case where the Negro can be served at a separate counter, he may still be prevented from sitting with whom he pleases. To separate him from others wholly because of his race could cause feelings of inferiority. Here the impact might vary with the age of the victim. A person in his formative years would be more strongly affected than an adult.[36]

The court should weigh the effect on the store owner of a holding that he must not distinguish between customers on the basis of color against the harm which would be caused the Negro if discrimination were found privileged. The owner of a restaurant, if he comes in contact with the customers, *e.g.*, by waiting tables or operating the cash register, also has an interest in choosing with whom he wishes to associate. The owner's interest in choosing his associates appears more worthy of protection than the like interest of the person discriminated against even though it has no psychological overtones. It is undesirable to hold that a person must associate with another merely because the other so wishes. Courts have consistently denied specific performance of personal service contracts for this reason.[37] The owner still has an interest in running the business in the way he sees fit even if he does not come in contact with the customers. When the bundle of rights comprising ownership is split among several persons, *e.g.*, by a lease, the importance of each one's interest depends on the relative importance of the rights he possesses to the total possible rights. To the extent that he has made a substantial private investment in the property, the owner and not the government should decide which people are to be served. There is always the possibility that catering to Negroes will cause a loss of white customers. The resulting drop in revenue could force a theretofore profitable concern out of business. Since the owner would have to withstand this loss, he should be allowed to choose freely whether or not he wishes to take the risk of integrating.

The petitioner would have to show that the hardship to him resulting

[36] Brown v. Board of Education, 347 U.S. 438 (1954).

[37] See, *e.g.*, Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 639 (1939).

from discrimination overbalanced the interest of the restaurant owner before the Supreme Court would reverse a state court's conviction for trespass. This would appear to be difficult in the typical sit-in case, where the convicted person probably had no reason for being on the premises except to demonstrate. Thus, the impact of being denied service at the particular establishment would not be too serious. Moreover, in the Deep South there is a strong possibility that customers would take their trade elsewhere rather than associate with Negroes, thus resulting in economic hardship on the owner. Even when these hurdles are met in the extraordinary case, overcoming the presumption of a state trespass statute's constitutionality would be very difficult. The petitioner, to do so, would have to fill his brief with empirical facts showing at least a need to eat at this particular place and minimizing the possibility of loss of revenue if the restaurant desegregated.